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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1969

No. 271

PETITION NOT PRINTED

RESPONSE NOT PRINTED

MICHAEL BUIE,

Petitioner,

vs.

UNITED STATES,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR PETITIONER

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Opinion Below

The opinion of the Court of Appeals for the Second Circuit (App. 13-18)[1] is reported at 407 F. 2d 905 (1969). No opinion was rendered by the district court.

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[1] "App." references are to the separate appendix filed pursuant to Rule 36 of this Court. The appendices to this brief will be cited as "Appendix A," etc.

Jurisdiction

The judgment of the Court of Appeals for the Second Circuit (App. 19) was entered on March 12, 1969. On April 1, 1969, an extension of time to file a petition for writ of certiorari was granted and the petition was filed on May 9, 1969. The petition for writ of certiorari was granted on June 23, 1969 (App. 20).

The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

Constitutional, Statutory and Regulatory Provisions Involved

United States Constitution, Amendment V:

> No person . . . shall be compelled in any criminal case to be a witness against himself. . . .

Statutes:

> The text of the statutes involved is set forth in Appendix A. The statutes are 26 U.S.C. 4741-4776.

Regulations:

> Detailed regulations governing the working of the Marihuana Tax Act are found at 26 C.F.R. 152.1-152.134. The text of these regulations is not set out since the Constitutional argument made herein depends primarily upon the statutes involved.

Question Presented

Do the provisions of 26 U.S.C. 4742(a) which require petitioner to transfer marihuana only in pursuance of an official order form, compliance with which would require petitioner to reveal incriminating information and to insure its transmission to federal and state law enforcement officials, violate petitioner's privilege against self-incrimination?

Statement of Facts

Petitioner was charged with selling marihuana to federal narcotics agents on two occasions not in pursuance of a written order form issued by the Secretary of the Treasury as required by 26 U.S.C. 4742(a) (App. 1-2).[2] Petitioner had been introduced to the federal agents by one Arlaus, a friend of petitioner's. The introduction was made so that the agents might purchase marihuana from petitioner. The federal agents did not know petitioner's last name (App. 4-7; R. 16-17, 133-134, 146, 178-179, 206-207, 214).[3] On April 19, 1968, following a three day jury trial, petitioner was acquitted on one count and convicted on one count of selling marihuana in violation of 26 U.S.C. 4742(a) (App. 1, 9-10). He was committed for treatment and rehabilitation under the narcotics addiction program for an indefinite term not to exceed five years (App. 1, 9-10).

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[1] A third count charged petitioner with receiving, concealing and facilitating the transportation of marihuana knowing the same to have been brought into the United States contrary to law, in violation of 21 U.S.C. 176(a). Petitioner was acquitted on this count (App. 1).

[2] References to the record below appear as "(R.)".

On four separate occasions during the trial proceedings, petitioner moved for dismissal or acquittal on the ground that compliance with the statutes under which he was indicted required him to forfeit his privilege against self-incrimination. His motion was denied on each occasion (App. 3-4, 7-8).

On appeal to the United States Court of Appeals for the Second Circuit, petitioner challenged the validity of his conviction for transfer of marihuana without the written order form. It was argued that the statutory scheme, of which the order form requirement is a part, constitutes a violation of petitioner's right against self-incrimination under the decisions of *Marchetti* v. *United States,* 390 U.S. 39 (1968), *Grosso* v. *United States,* 390 U.S. 62 (1968), and *Haynes* v. *United States,* 390 U.S. 85 (1968).[4, 5]

The Court of Appeals affirmed the conviction, relying wholly on *United States* v. *Minor,* 398 F.2d 511 (2d Cir. 1968) (App. 13-18). *Minor* held that the self-incrimination privilege does not prohibit conviction of a seller of a narcotic drug for selling not in pursuance of a written order form as required by 26 U.S.C. 4705(a). The Court of Appeals did not distinguish the requirements of the narcotic drugs statutes (26 U.S.C. 4701-4736) from the requirements of the marihuana tax statutes involved here (26 U.S.C. 4741-4776) (App. 14-15). The Court of Appeals

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[4] A claim of error with respect to the charge to the jury on the defense of entrapment was also raised on appeal and was rejected by the Court of Appeals. That ground is not raised in this proceeding.

[5] At the time of the decision below the Supreme Court had not yet decided *Leary* v. *United States,* 395 U.S. 6 (1969).

found that the marihuana tax statutes, like the narcotic drugs statutes in *Minor*, did not pose a self-incrimination problem to a transferor even if they did pose such a problem to a transferee; both statutes were not aimed at a class "inherently suspect of criminal activities" but were rather statutory schemes regulating the conduct of a lawful business (App. 15-16).

Summary of Argument

The marihuana tax provisions (26 U.S.C. 4741-4776) consist of an integrated network of statutes, a principal purpose of which is to expose the details of transactions involving marihuana to the close scrutiny both of federal and state law enforcement officials. The order form provisions of 26 U.S.C. 4742(a) as they relate to a transferor are an essential element of that purpose. The order form provisions violate petitioner's privilege against self-incrimination by compelling him, as a requirement of obeying federal law, to insure that his name and his address are recorded by the federal government as a proposed transferor of marihuana. This information is given to state law enforcement officials for use in the enforcement of state marihuana laws. Possession of marihuana is illegal, except under highly limited circumstances, in every state.[4] The statute further requires him to obtain and keep available evidence of the completed marihuana transaction for inspection by law enforcement officers. These requirements taken by themselves or when considered, as they must be, in the context of the entire marihuana tax

[4] *Leary* v. *United States*, 395 U.S. 6, 16 (1969).

structure which includes the registration provisions (26 U.S.C. 4751-4757), exist in "an area permeated with criminal statutes", and those in petitioner's position are a group "inherently suspect of criminal activities."[7] Under recent cases decided by this Court, this statute violates petitioner's privilege against self-incrimination.

ARGUMENT

Petitioner's Fifth Amendment Privilege Against Self-Incrimination Is Violated by Conviction for Violation of 26 U.S.C. 4742(a) Which Requires Transfers of Marihuana to Be Made Only Pursuant to an Official Order Form, Since Compliance With That Law Requires Petitioner to Reveal Incriminating Information and to Insure Its Transmission to Federal and State Law Enforcement Officials and to Provide Evidence of His Own Unlawful Behavior.

Petitioner was convicted for transferring marihuana not "in pursuance of a written order form of the person to whom such marihuana is transferred", in violation of 26 U.S.C. 4742(a). This conviction violates petitioner's privilege against self-incrimination, since compliance with the statute would have required petitioner to expose himself "to a real and appreciable risk of self incrimination" by revealing information which "would surely prove a significant 'link in a chain' of evidence tending to establish his guilt" within the meaning of *Leary* v. *United States*, 395 U.S. 6, 16 (1969), *Marchetti* v. *United States*, 390 U.S. 39,

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[7] *Marchetti* v. *United States*, 390 U.S. 45, 47 (1968), quoting *Albertson* v. *SACB*, 382 U.S. 70, 79 (1965).

48 (1968), *Grosso* v. *United States*, 390 U.S. 62 (1968), and *Haynes* v. *United States*, 390 U.S. 85 (1968).

A. The Statutory Scheme Governing Traffic in Marihuana.

The Marihuana Tax Act,[8] now codified as 26 U.S.C. 4741-4776, contains a comprehensive integrated scheme of taxation, registration and recording, which is designed to expose to official scrutiny all aspects of traffic in marihuana.[9] The system consists of two parts. The first is a transfer tax and order form part, while the second is an occupational tax and registration part which relates to dealers.

26 U.S.C. 4741-4746 is the transfer tax and order form part. 26 U.S.C. 4741 imposes a transfer tax on all transfers which are required by section 4742 to be made pursuant to a written order form. The tax is payable by the transferee when he receives the order form, but if the transferee fails to obtain the form and pay the tax, the transferor is liable for payment of the tax (26 U.S.C. 4741(b)). The transfer tax rate is $1 per ounce for transfer to any

[8] "An Act to impose an occupational excise tax upon certain dealers in marihuana, to impose a transfer tax upon certain dealings in marihuana, and to safeguard the revenue therefrom by registry and recording," 50 Stat. 551 (1937).

[9] "Marihuana" is defined by §4761 to exclude from the coverage of the act the stalk, hemp, fibre, oil and seed when sterilized, thus eliminating from regulation the vast bulk of commercial dealings in products of the Marihuana producing plant. The legislative history reveals an intention to eliminate interference with legitimate usage of the plant. See Hearings Before the Committee on Ways and Means, House of Representatives, 75th Cong., First Sess. on H.R. 6385, statement of Clinton M. Hester, Assistant General Counsel for the Treasury Department, p. 8.

person who has registered and paid the special occupation tax under the occupational tax sections (§§4751-4757) and $100 per ounce to all other transferees (26 U.S.C. 4741(a)(1) and (a)(2)). 26 U.S.C. 4742(a) requires that transfers be made only pursuant to a written order issued by the Secretary of the Treasury.[10]

26 U.S.C. 4742(d) provides that at the time when the Secretary of the Treasury issues the official order form (Appendix B) required by §4752(a), he shall record on the form the names and addresses both of the proposed transferor and the proposed transferee, and the amount of marihuana to be sold. The form is issued in triplicate, one copy of which is retained by the Secretary of the Treasury. The transferee receives two copies, one of which he gives to the transferor prior to the transfer of marihuana. Both transferor and transferee must keep their copies for two years and display them to any state or federal law enforcement official mentioned in §4773.

26 U.S.C. 4744 makes it unlawful for any transferee required to pay the §4741(a) transfer tax to acquire, transport or conceal marihuana without paying the tax. Proof that a person "shall have had in his possession any marihuana," combined with failure to produce the §4742(a) order form gives rise to a presumption of guilt under §4744.

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[10] 26 U.S.C. 4742(b) exempts from the order form requirement transfers to patients by doctors or other medical practitioners registered under §4753; transfers by druggists to patients based on prescriptions of doctors; lawful transfers for export; lawful transfers to federal and state officials; and certain transfers of seeds. Certain transfers by millers are exempted by 4742(e).

The occupational tax provisions are contained in 26 U.S.C. 4751-4757. Section 4751 requires that any person who "deals in" marihuana, i.e., who "imports, manufactures, produces, compounds, sells, deals in, dispenses, prescribes, administers or gives away" marihuana shall pay an annual special tax. Any person subject to the §4751 special tax is required by §4753 to register his name and business address with the Internal Revenue Service. Section 4754 requires registrants under §4751 to supply reports, as demanded by the Secretary of the Treasury, setting forth in detail the sources of all marihuana acquired by the registrant in the preceding three months. Section 4755 makes it unlawful for any person required to register and pay the special tax as described in §§4751-4753 to engage in any of the activities described in §4751, i.e., "dealing", without having registered and paid the tax; this offense is designated "trafficking".

Sections 4773 and 4775 make the information obtained by the federal government pursuant to the order form provision, §4742, and the registration provision, §4753, available to federal, state and local law enforcement officials concerned with marihuana control. Under §4773 certified copies of the §4742 order forms are made available to any federal, state or local official whose job is concerned with the marihuana traffic. Section 4775 makes available to any interested person the name of any person registered as a special taxpayer, i.e., as a dealer in marihuana under §4751. Regulations implementing the Marihuana Tax Act are found at 26 C.F.R. 152.1-152.134.

B. The Danger of Self-Incrimination Inherent in the Order Form Requirements Applies Equally to Transferors and Transferees.

This Court has recently reviewed the order form requirements of the Marihuana Tax Act and found that, as applied to a transferee, the statute compels exposure to a real and appreciable risk of self-incrimination. *Leary* v. *United States*, 395 U.S. 6, 16 (1969). The reasoning in that case was that compliance with the law required a transferee to reveal information which identified him as having a high probability of being guilty of crimes under both federal and state law; that an unregistered transferee was a member of a selective group inherently suspect of criminal activities; that the information so revealed was transmitted to relevant federal and state law enforcement officials; and that this information would prove a significant "link in a chain" of evidence tending to establish his guilt. Exactly the same reasoning which this Court applied to a transferee applies to a transferor.

Petitioner here is charged with transferring marihuana not pursuant to a written order form. The transferee must procure this order form from the federal government (§4742(a)). In order for the transferee to obtain the form he must first obtain the name and address of the proposed transferor from the transferor so that he can provide to the Secretary of the Treasury, prior to the transfer, his own name and address, the name and address of the transferor and the amount of marihuana to be transferred (§4742(c)). Therefore, to comply with the statute the transferor is compelled by law to give his name and address to the transferee, identifying himself as a seller of mari-

huana, so that the transferee, acting under compulsion of law, will pass this information to government officials engaged in apprehending violators of the marihuana laws, both state and federal.

It cannot be overlooked that a transferor of marihuana must at some point be a possessor of marihuana. As such he must necessarily also be either a transferee of marihuana, in connection with a prior transaction, or a producer or importer. All three of these ~~statutes~~ Statuses are very tightly controlled and highly circumscribed with criminal penalties by both federal and state law.

With respect to petitioner's status as a transferor under federal law, the occupational tax and registration provisions (§§4751-4757) require registration and payment of tax by anyone who "deals in" or transfers marihuana. This includes producers and importers. Transferring marihuana without having registered and paid the special tax is a federal crime under §4755. If petitioner was in fact not registered this fact would be readily determinable by the government, since the list of registrants is public (§4775). Compelling him to reveal his status as an unregistered transferor to the federal government by compelling him to comply with §4742(a) requires petitioner to incriminate himself under §4755. Moreover, the related portions of §4742 require petitioner to generate and preserve tangible admissible evidence of his illegal acts. Under §4742(d) petitioner receives a copy of the incriminating §4742(a) order form, listing him as a transferor (§4742(c)); he is required to keep the form for two years and display it to the various law enforcement officers who are informed of its existence under §4773.

Petitioner's status as a transferor necessarily implies his status as a transferee in an earlier transaction. As such he is required to have obtained an order form, copies of which should be on file with federal officials and in his possession. Failure to obtain an order form as a transferee constitutes a criminal violation of §4744. Moreover, under §4744(a), proof of possession of marihuana, whether present or past, combined with failure to produce a copy of the order form on demand, gives rise to a presumption of violation of 26 U.S.C. 4744. It is clear that compelling petitioner to comply with §4742(a) as a transferor also compels him to give information which incriminates himself as a transferee under §4744(a).

There is a small class of transferees exempted from the order form requirement, and therefore a theoretical possibility that petitioner could have obtained his marihuana in a lawful way even if he had not obtained order forms. Examination of this possibility, however, reveals that it is both hedged about with other incriminatory restrictions and is sufficiently unlikely to exist in fact, as to be insignificant. Section 4742 exempts from the order form requirement transfers (1) to patients by doctors registered under §4753; (2) to consumers (patients) by dealers, pursuant to a prescription by a registered doctor; (3) to persons in other countries; (4) to government officials; (5) of seeds to a person registered under §4753. The statute requires that detailed records of transfers to patients (exceptions 1 and 2 to §4742(b)) be kept. The record must show the name and address of the transferee, the date of transfer and the amount transferred. The record must be kept for two years and is available for inspection by state and federal law enforcement officers. Moreover, 26 C.F.R. 152.85 requires

that when a prescription is filled the container in which the marihuana is placed must indicate the name and registry number of the dealer, the name and address of the patient and the name, address and registry number of the person issuing the prescription. Under New York law it is a crime for a patient to possess marihuana outside of the original container in which it was dispensed, N.Y. Public Health Law, §3331(1). Petitioner could not qualify at all under exceptions (3), (4) or (5) to §4742(b) since they relate to transfers to persons outside the United States, to government officials, and to persons registered under §4753 respectively. It is clear, therefore, that those few exceptions which would allow petitioner lawfully to obtain marihuana to transfer (absent registration by petitioner and possession of order forms by petitioner as transferee in a prior transaction) generate sufficient records to expose petitioner as failing to come within the lawful limits of the exceptions. Revealing petitioner as an unlawful transferor would thus have a high probability of revealing him as an unlawful transferee.

It is also true, that law enforcement officials view disclosure of the status of transferor as carrying with it disclosure of the status of transferee. The dual dangers attached to disclosure of transferor status are amply demonstrated by the recent case of *United States* v. *Simon,* Docket No. 67 CR 45 (W.D. Wisc., 1967).[11] In that case one Friedman revealed to police that Simon had sold and was selling marihuana. While under police observation Friedman received a package of marihuana by mail from Simon. Thus

[11] The statement of facts in this case is taken from the Opinion in *United States* v. *Simon,* 409 F.2d 474 (7th Cir. 1969), which dealt with another aspect of the same case.

the only known facts revealed Simon as a transferor. As a result of this knowledge Simon was indicted not only for transferring marihuana not pursuant to an order form, in violation of §4742(a), but also for being a transferee and transporting marihuana without having paid the transfer tax, in violation of §4744(a). Thus *Simon* serves to emphasize the danger accruing to one who by obeying 4742(a) expressly exposes himself as a transferor and by inference exposes himself as a transferee.[12]

The danger to petitioner as a result of compliance with the order form provisions with respect to incrimination under the laws of New York State, where the transfer in this case took place, has already been dealt with extensively by this Court in *Leary* v. *United States,* 395 U.S. 6, 16-18 (1969). In *Leary,* the petitioner, a transferee, had failed to obtain an order form from the Secretary of the Treasury, an event which must take place prior to the transfer (26 U.S.C. 4742). Had he obtained such a form the information it contained would have been available to New York State narcotics laws enforcement officers (26 U.S.C. 4773). With respect to the resulting danger, this Court found that:

> "Petitioner had ample reason to fear that transmittal to such officials of the fact that he was a recent, unregistered transferee of marihuana 'would surely prove a significant "link in a chain" of evidence tending to establish his guilt' under the state marihuana laws then in effect. When petitioner failed to comply

[12] The indictment against Simon was dismissed with respect to the violations of §4742 and §4744. The Opinion, which applied the *Leary* reasoning to a transferor is attached hereto as Appendix C.

with the Act, in late 1965, possession of any quantity of marihuana was apparently a crime in every one of the 50 States, including New York, where petitioner claimed the transfer occurred, and Texas, where he was arrested and convicted. It is true that almost all States, including New York and Texas, had exceptions making lawful, under specified conditions, possession of marihuana by: (1) state-licensed manufacturers and wholesalers; (2) apothecaries; (3) researchers; (4) physicians, dentists, veterinarians, and certain other medical personnel; (5) agents or employees of the foregoing persons or common carriers; (6) persons for whom the drug had been prescribed or to whom it had been given by an authorized medical person; and (7) certain public officials. However, individuals in the first four of these classes are among those compelled to register and pay the occupational tax under §§4751-4753; in consequence of having registered, they are required to pay only a $1 per ounce transfer tax under §4741(a)(1). It is extremely unlikely that such persons will remain unregistered, for failure to register renders them liable not only to an additional $99 per ounce transfer tax but also to severe criminal penalties. Persons in the last three classes mentioned above appear to be wholly exempt from the order form and transfer tax requirements.

"Thus, at the time petitioner failed to comply with the Act those persons who might legally possess marihuana under state law were virtually certain either to be registered under §4753 or to be exempt from the order form requirement. It follows that the class of possessors who were both unregistered and obliged to

> obtain an order form constituted a 'selective group inherently suspect of criminal activities.' Since compliance with the transfer tax provisions would have required petitioner unmistakably to identify himself as a member of this 'selective' and 'suspect' group, we can only decide that when read according to their terms these provisions created a 'real and appreciable' hazard of incrimination." *Leary* v. *United States*, 395 U.S. 6, 16-18.

The dangers under New York State law which this Court found attached to a transferee conforming to §4742 apply equally to a transferor complying with §4742, since the illegal status under New York State law is purely and simply that of a "possessor". New York Public Health Law §3305 places a flat prohibition on possession of marihuana except as authorized by the Public Health Law. The exceptions to this flat prohibition are those noted by the Court in *Leary*.

An examination of the order form actually used under §4742 is instructive. See Appendix B. This form is an authorization, directed to a named proposed transferor, to transfer specified quantities of marihuana to a named proposed transferee. To the extent that this form is evidence of possession on anyone's part, and hence evidence of violation of state law, it is evidence of possession by the named transferor. When the form is filed, the transfer has not yet taken place and the drug may be presumed to reside with the transferor. Nevertheless, this Court, in *Leary*, recognized that the existence of the form indicates the described transaction will very shortly have been

completed.[13] This Court having held that listed status on the §4742 form as a transferee "would surely prove a significant link in a chain of evidence tending to establish his guilt," *Leary* v. *United States, supra* at 18, it follows *a priori* that listing as a proposed transferor gives rise to such danger.

It is clear, for the reasons stated above, that one in petitioner's position is a member of a class "inherently suspect of criminal activities." *Marchetti* v. *United States, supra* at 57. However, the Court of Appeals, relying wholly on *United States* v. *Minor,* 398 F.2d 511 (2d Cir. 1968), a case dealing with the position of a transferor under the narcotic drug laws, rejected this claim. The Court of Appeals relied upon its finding in *Minor* that the transfer requirement under the narcotic drug laws was "one section of an important and significant statutory scheme regulating the conduct of a lawful business." *United States* v. *Minor, supra* at 516, quoted in *United States* v. *Buie,* 407 F.2d 905 (2d Cir. 1969), at 907. It found that this rule was equally applicable to the marihuana laws. In so deciding, the Court of Appeals overlooked both the structure of the marihuana statute and the differences in the subject matter regulated by the narcotic drug laws and the marihuana laws.

Minor held that the position of a transferor of narcotic drugs who violates the order form requirements of 26 U.S.C. §4705 was not protected by the privilege against

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[13] The Court considered that the information transmitted to law enforcement officials as a result of the filing of the form is that petitioner "was a recent, unregistered transferee of marihuana." 395 U.S. at 16.

self-incrimination as developed in *Marchetti, Grosso* and *Haynes.* In reaching this conclusion the *Minor* Court found that the sizable legitimate trade in narcotic drugs created a valid government purpose of regulation and meant that the statute was not aimed at a criminally suspect class. The Court noted that in 1965 nearly 400,000 people were registered under the narcotic drug laws and were thereby authorized to obtain order forms from the Treasury Department.[14] *United States* v. *Minor, supra* at 516. More than 400,000 kilograms of narcotic drugs were legally imported in that year. With such a sizable legitimate trade, the Court believed that §4705, taken by itself, serves the valid purpose of seeing that narcotic drugs legitimately present are not sold to anyone who is not authorized to buy them and who did not pay the tax. Moreover, the sizable class of legitimate users indicates that the statute is not aimed at a group "inherently suspect of criminal activities."

The facts surrounding marihuana are in absolute contrast to the facts surrounding narcotic drugs. In the same year in which nearly 400,000 persons were registered under the narcotic drug laws, exactly 89 persons were registered under the marihuana laws. These consisted of 5 importers and manufacturers, 9 dealers, 59 practitioners and 16 researchers.[15] While the number of narcotic drug registrants has increased approximately 20% since 1936, the number of marihuana registrants has declined from 3,665 in 1938,

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[14] Under the narcotic drug laws, unlike the marihuana laws, only registered persons may procure order forms. 26 U.S.C. 4705(f).

[15] U.S. Treasury; Bureau of Narcotics, *Traffic in Opium and Other Dangerous Drugs,* Government Printing Office, 1966 at 56.

the first year for which figures are given, to 83 in 1967.[16] While the Bureau of Narcotics material gives several pages detailing numerically the production and distribution of narcotic drugs, the principal table governing the sources and distribution of marihuana for 1966 simply shows the number of acres of marihuana destroyed on a per state basis in one year. While the 1967 report contains six pages of detailed information on the legitimate production of narcotic drugs including classes of drugs, licenses to produce drugs, quantities of various drugs produced and disposition of drugs produced, the report contains no information at all on the valid uses of marihuana.[17] No statement as to any lawful importation of marihuana is made, although a table of importation of narcotic drugs is given.[18] Considering these facts, it is without doubt true that, unlike the narcotic drug acts, the marihuana statutes are aimed at a class "inherently suspect of criminal activities" and are intended to close down a criminal business rather than to regulate a legitimate one.[19]

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[16] U.S. Treasury; Bureau of Narcotics, *Traffic in Opium and Other Dangerous Drugs*, Government Printing Office, 1967 at 42. The marihuana registrants at the end of 1967 consisted of 6 importers and manufacturers, 1 grower, 6 dealers, 49 practitioners and 21 researchers.

[17] U.S. Treasury, Bureau of Narcotics, *Traffic in Opium and Other Dangerous Drugs*, Government Printing Office, 1967, pages 18-21, 41-42. The only reference to legitimate usage of marihuana in the entire report, other than the number of lawful registrants, was this sentence: "Narcotic drugs have proved themselves invaluable to modern medicine while both narcotics and marihuana play an important role in scientific research and experimentation," at page 17.

[18] *Ibid.*, page 41.

[19] The court in *Buie* acknowledged that only a trivial number of registrants are presently regulated by the marihuana tax statutes (App. 16). However, the court felt that the originally substantial

In addition, the Court of Appeals in *Buie* overlooked the significance of the relationship between the occupational tax sections and the transfer tax sections of the marihuana law on the question of the "inherently suspect" nature of the group at which it is aimed. 26 U.S.C. 4751-4753 requires everyone who deals in marihuana to register; a "dealer" is for practical purposes synonymous with a transferor. The class of unregistered transferors is absolutely suspect under federal law. To the extent that the order form provisions are aimed at that class, which includes petitioner, they are aimed at a suspect class.[20] The nature of the suspect class with respect to state law has already been dealt with by this Court in *Leary*. The Court concluded:

> "Thus, at the time petitioner failed to comply with the Act those persons who might legally possess marihuana under state law were virtually certain either to be registered under §4753 or to be exempt from the order form requirement. It follows that the class of possessors who were both unregistered and obliged to obtain an order form constituted a 'selective group inherently suspect of criminal activities.' Since com-

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number of registrants meant that the current regulation was of a legitimate traffic in marihuana. However, it is the condition existing at the time a law is challenged rather than the condition that existed at the time of its passage which must be considered in gauging its validity. See, e.g., the approach of this Court in *Leary* v. *United States*, 395 U.S. 6, 37-43 (1969) in considering the validity of a presumption in the light of changed circumstances.

[20] Indeed, the legislative history of the act demonstrates that regulation of legitimate users of marihuana was intended to be accomplished through the registration provisions while the order form provisions were intended primarily to reveal unlawful users. See Hester, Hearings before the House Committee on Ways and Means on H.R. 6385, 75th Cong., 1st Sess. (1937) at pages 45-47.

pliance with the transfer tax provisions would have required petitioner unmistakably to identify himself as a member of this 'selective' and 'suspect' group, we can only decide that when read according to their terms these provisions created a 'real and appreciable' hazard of incrimination." *Leary* v. *United States,* 395 U.S. 6, 18.

The same reasoning applies to a transferor, since the illegal act under state law is that of possession. The dangers to a transferor are as great as those to a transferee and the *Leary* and *Marchetti* reasoning, rather than the *Minor* reasoning, should apply.

C. The Fifth Amendment Privilege Applies to the Position of a Transferor of Marihuana.

1. *Exposure of the Transferor Is an Essential Purpose of the Marihuana Tax Statutes*

The marihuana tax statutes provide a system of registration, order forms and informational tax returns which have the effect of exposing the details of all marihuana transfers to the examination of law enforcement officials. These details include names and addresses of both buyers and sellers and quantities of drug transferred. It is obvious from the workings of the statute that information about sellers is as much sought as information about buyers. All dealers must register (§4753). All registrants must file returns setting forth in detail the sources of all marihuana they receive (§4754). Transferees must file the details of proposed transactions with the government, including the name of the transferor, prior to the transfer (§4742). That information which might be useful to federal and state prose-

cutorial agencies is made available to them (§§4773, 4775). To facilitate the work of the law enforcement agencies, the parties involved are required to maintain evidentiary records of the transaction, which must be available to the agencies (§4742). It is clear from examination of the statutory scheme that exposure of all parties to transactions in marihuana is an essential purpose of the act, and not a by-product of its revenue producing purpose.

A review of the legislative history of the Marihuana Tax Act reveals that it is precisely the disclosure, both of the transferor and of the transferee, which Congress sought to bring about. The bill originated in the House of Representatives where hearings were held before the Committee on Ways and Means. The initial descriptive and explanatory statement of the bill was made by Clinton M. Hester, the Assistant General Counsel of the Treasury Department. He described the objectives of the bill as follows:

> "In accomplishing this general purpose two objectives should dictate the form of the proposed legislation: First, the development of a scheme of taxation which would raise revenue and which would also render virtually impossible the acquisition of marihuana by persons who would put it to illicit uses without unduly interfering with the use of the plant for industrial, medical and scientific purposes; and, second, the development of an adequate means of publicizing dealings in marihuana in order that the traffic may be effectively taxed and controlled." [21]

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[21] Hearings on H.R. 6385 before the House Committee on Ways and Means, 75th Cong., 1st Sess. (1937) at p. 7.

Substantially the same language appears in the Senate Hearings,[22] Senate Report,[23] and in Congressional debate.[24] In reviewing the validity of the transfer tax provisions in *United States* v. *Sanchez,* 340 U.S. 42 (1950), the Supreme Court noted that Congress had dual objectives in passing the Act, and quoted the above quoted language of Mr. Hester.[25] In addition, during the House hearings on the bill Mr. Hester explained the bill in some detail. He described it as a synthesis of the Harrison Narcotics Act (38 Stat. 785) and the National Firearms Act (48 Stat. 1236). Mr. Hester then reviewed the various Supreme Court decisions which had sustained the Constitutionality of these acts and related the proposed Marihuana Tax Act provisions to these cases.[26] In discussing the order form requirement of the Marihuana Tax Act, Mr. Hester quoted from *Nigro* v. *United States,* 276 U.S. 332 (1928) which concerned the order form provisions in the Harrison Narcotics Act.

". . . . The provision of section 2 making it an offense to sell unless the purchaser gives a particular official

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[22] Statement of Clinton M. Hester, Assistant General Counsel, Treasury Department, in Hearings before a Subcommittee of the Committee on Finance, United States Senate, 75th Cong., 1st Sess., on H.R. 6906 at p. 6.

[23] Senate Report No. 900 Committee on Finance, 75th Cong., 1st Sess. (1937) to accompany H.R. 6906, at p. 3.

[24] 81 *Cong. Rec.* p. 5689 at 5690, 75th Cong., 1st Sess (House); 81 *Cong. Rec.* p. 1440 at 1441, 75th Cong., 1st Sess. (Extension of Remarks of Congressman Buck).

[25] Petitioner has not located any authority which disagrees with Mr. Hester's statement of the dual objectives of the Act.

[26] Statement of Clinton M. Hester before the House Committee on Ways and Means, 75th Cong., 1st Sess. (1937) on H.R. 6385 at pp. 6-16.

> form of order to the seller was enacted with a like object. The sale without such an order form carries its illegality on its face. Its absence dispenses with the necessity of sending to examine the list of those registered to learn whether the seller is engaged in a legal sale. The requirement that the official forms can only be bought and obtained by one entitled to buy, whose name shall be stamped on the order form, and that after the sale the order form shall be recorded, effects a kind of registration of lawful purchasers, in addition to one of lawful sellers, and keeps selling and buying on a plane where evasion of the tax will be difficult." [27]

The idea that the order form provides a registration of lawful sellers (or conversely a device for the exposure of an unlawful seller) is even more appropriate in the case of the marihuana laws where the "recording" of the seller and of the sale takes place prior to the sale.

It is clear from the legislative history that there are two fundamental and equally important objectives of the statute. One is raising revenue and making it difficult for those who would use marihuana for illicit purposes to acquire it. Insofar as this objective is met by the order form, the requirement seeks to deal with the transferee and requires his name and address. If the only concern of the law was acquisition, there would be no need to obtain the name of the transferor. *Cf.* the scheme of the Narcotic Drug Act discussed below. The other and equally important objective of the Act is "publicizing dealings in marihuana

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[27] Hester, statement before the House Committee on Ways and Means on H.R. 6385, 75th Cong., 1st Sess., at pp. 12-13, quoting *Nigro* v. *United States.*

in order that the traffic may be effectively taxed and controlled." [28] Insofar as this second objective is met by the order form requirement, the requirement seeks information about transferors.

The Act seeks information about "dealings", not just about transferees. Part of this information is the name and address of the transferor. This information must be thought of as essential to the functioning of the order form section. The government seeks information about the "dealings" of the parties and seeks it before it will permit the "deal" to be completed. The government is as interested in the source of marihuana as it is in its destination. The revenue aspect of a particular transaction is clearly met by the requirement on the transferee of paying the tax prior to the sale. The requirement on the transferor of self-exposure by means of the order form is solely related to the law enforcement aspect of the statute. In this regard it is disclosure of violators which is sought. As Mr. Hester stated:

> "... As an additional means of bringing the marihuana traffic out into the open, the bill also makes it illegal, with certain exceptions, to transfer marihuana except in pursuance of a written order form setting forth the facts surrounding the transaction. Substantial criminal penalties are imposed for violating the order form or registry provisions of this bill." [29]

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[28] Hester, Statement before the House Committee on Ways and Means on H.R. 6385, 75th Cong., 1st Sess. (1937), at p. 7.

[29] *Ibid.* at pp. 7-8. Essentially the same statement appears in Report No. 900 of the Senate Committee on Finance, to accompany H.R. 6906, 75th Cong., 1st Sess. (1937) at p. 3.

It was further intended that the functioning of the federal law should aid the enforcement efforts of the states. Although most of the states had legislation on the subject, there appeared to be a need for legislation which would enable the federal government to assist the states in their law enforcement efforts.[30] This explains the provisions of the law which provide the names of transferors of marihuana to state law enforcement officials and compel transferors to maintain copies of order forms for display to state law enforcement officials.

This examination of the development of the act reveals that it was a clear purpose of the act to compel a proposed transferor of marihuana to expose his behavior fully to the inspection of state and federal law enforcement officials. If he was an illicit transferor he was given the choice of disobeying federal law and risking serious penalties or of complying and subjecting himself to certain prosecution under state law and probably under the federal law itself (e.g. as an unregistered transferor). The act must therefore be thought of as an integrated whole, one of whose purposes is to compel a transferor to reveal incriminating information to the government about his marihuana transaction, through the agency of the transferee, and to maintain incriminating evidence of this transaction in the form of his copy of the order form.

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[30] Statement of Harry Anslinger, Commissioner of the Bureau of Narcotics to Hearings of the House Committee on Ways and Means on H.R. 6385, 75th Cong., 1st Sess. (1937) at pages 26, 31, and exhibit at p. 40.

2. *The Privilege Applies to the Acts Required of a Transferor*

The Marihuana Tax Act has, as one of its principal purposes, exposure of the identity of transferors of marihuana to the scrutiny of federal and state law enforcement officials. A principal method for achieving this end is the order form requirement. See Point 1 above. The Act requires that the identity of a transferor be on file with the government prior to any transfer and that evidence of the completed transfer remain in the possession of the transferor for examination by federal and state law enforcement officials (§4742). The requirements upon the transferor are thus two. He must provide his name and address to the transferee so that the transferee, acting as the statutory agent of the government for procuring this information, will transmit it to the government prior to the sale. The transferee must also accept from the transferor, the government's statutory agent for insuring its delivery to the transferor, evidence of a completed transaction and keep this evidence for inspection of law enforcement officials. If a potential transferor is unregistered, as is petitioner, he is in effect required to tell the government that he is in the process of committing federal and state crimes, and then required to maintain evidence of his completed crime in order to assist law enforcement officers in his apprehension and prosecution. It is difficult to conceive of a situation more clearly within the protection of the Fifth Amendment privilege against self-incrimination.

As petitioner has demonstrated, it is this exposure of the transferor to law enforcement that the statute seeks. In judging the constitutionality of the statute both aspects of a transferor's obligation, the production of information

and the maintenance of evidence, must be considered. As this Court has held, the constitutionality of a statute, with regard to self-incrimination dangers, "may properly be determined only after assessment of the hazards of incrimination which would result from 'literal and full compliance' with all the statutory requirements." [31]

The privilege against self-incrimination clearly applies to the marihuana statute. *Leary* v. *United States, supra.* As *Leary, Marchetti, Grosso* and *Haynes* have shown, the privilege applies to a requirement of supplying incriminating information to the government in an ostensibly noncriminal proceeding where, as here, the area involved is "permeated with criminal statutes" and the group of persons involved is one "inherently suspect of criminal activities." [32] This is precisely petitioner's situation.

The mere fact that the government has, for its own purposes, chosen to make the transferee its agent for procuring the information which it seeks from the transferor, does not eliminate the self-incrimination aspect of the situation. Petitioner is clearly compelled by the government to provide it with incriminatory information. The transferee is compelled to seek it for conveyance to the government and the transferor is compelled to supply it for conveyance to the government. Afterwards the transferor is compelled to maintain evidence of his act and to produce it with self-incriminatory results on demand of the government. If the introduction of an involuntary intermediary

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[31] *Grosso* v. *United States,* 390 U.S. 64, 67 (1968), quoting *Albertson* v. *SACB,* 382 U.S. 70, 78.

[32] *Marchetti* v. *United States,* 390 U.S. 39, 47 (1968), quoting *Albertson* v. *SACB,* 382 U.S. 70, 79.

into a situation where the privilege so clearly applies could vitiate the privilege, then clearly the privilege could be completely defeated through the use of adroit legislation.[33]

The court below held that the privilege was personal and that the transferor was attempting to take advantage of the transferee's privilege. *United States* v. *Buie,* 407 F.2d 905, 907 (2d Cir. 1969). The court cited *Hoffa* v. *United States,* 385 U.S. 293 (1967). Petitioner agrees that the privilege is personal. It is clear, however, that petitioner is seeking to assert his own privilege as transferor and not that of the transferee. Simply because information reaches the government through the transferee does not mean that all privileges associated with the information belong to the transferee. For example, disclosure of the transferor's name is incriminating to the transferor and the transferee would not normally have sufficient interest to claim the privilege with respect to it. An analogous case which deals with this point is *Helvering* v. *Davis,* 301 U.S. 619 (1937). That case involved a challenge to the constitutionality of the Social Security Act. A shareholder of a corporation sued to enjoin the corporation from withholding taxes on employee's wages. The Commissioner of Internal Revenue, as intervenor, argued that the corporation and, therefore, the shareholder, was merely a collecting agent with no interest of its own to present to the court. The district court agreed with this; the Court of Appeals reversed on other grounds. The Supreme Court reversed, reinstating the district court opinion. It is of

[33] This reasoning was applied by the court in *United States* v. *Simon,* Docket No. 67 CR 45 (W.D. Wisc. July 16, 1969), in dismissing an indictment against a marihuana transferor. The court applied the reasoning of *Leary* to a transferor. The opinion is annexed hereto as Appendix C.

course true that one may assert the privilege only with respect to one's own interests, but the person who finally conveys the information to the government is not necessarily the one whose interests are involved.

The government often works through involuntary, unpaid agents, particularly in the tax area. It was long ago held that this is constitutional. In *National Bank* v. *Commonwealth,* 76 U.S. 353 (1869) and *Merchants Bank* v. *Pennsylvania,* 167 U.S. 461 (1897), the Supreme Court held that a state could levy a tax on the shares of stock in a bank and compel the bank to pay the tax. Since a state could not tax a national bank, the state statutes were invalid if the tax was on the bank itself rather than on the shares. The Court held that making the bank the involuntary agent for the collection of taxes due from shareholder was perfectly proper, and did not convert the tax into one upon the bank itself. Indeed, in *National Bank* v. *Commonwealth,* 76 U.S. 353, 361 (1869) the Court noted that "[i]n the case of shareholders not residing in the state, it is the only mode in which the state can reach their shares for taxation."

The reasoning of these cases applies to petitioner's situation. The government has made the transferee its agent for collecting information and dispensing incriminating evidence. There is no reason why information should be treated any differently than taxes in this regard. The government has presumably chosen the transferee as its agent because use of that method provides access to the transferor, the real object of concern (with respect to his half of the transaction), who might otherwise remain hidden. The interest involved and the owner of the privilege re-

mains the transferor in spite of the introduction of the agent.

The critical element in the availability of the privilege is coercion and compulsion as opposed to voluntariness. As the Supreme Court held in *Hoffa* v. *United States,* 385 U.S. 293, 304 (1966), "a necessary element of compulsory self-incrimination is some kind of compulsion." In *Hoffa,* the defendant had made incriminating admissions to a trusted confidant, not knowing that the confidant had become an agent of the federal government. In rejecting defendant's claim that his privilege against self-incrimination had been violated, the Court held:

> "In the present case no claim has been or could be made that the petitioner's incriminating statements were the product of any sort of coercion, legal or factual. The petitioner's conversations with Partin and in Partin's presence were wholly voluntary. For that reason, if for no other, it is clear that no right protected by the Fifth Amendment privilege against compulsory self-incrimination was violated in this case." *Hoffa* v. *United States,* 385 U.S. 293, 304.

The *Hoffa* situation is clearly not petitioner's situation. The marihuana tax statutes are replete with compulsion and legal coercion. A transferor may not by law transfer marihuana unless he insures that his name is given to the government for law enforcement use. The defendant in *Hoffa* had his choice about giving information to the agent; the transferor of marihuana has no choice. The transferee in *Buie* did not know Buie's name (App. 6-7; R. 16-17, 206); he did not procure a form (App. 5). For petitioner to comply with the law he would have been required to

enter into the order form process and to insure that information, incriminating to himself, reached the government. This process includes conveying incriminating information to the government by way of the transferee and receiving the incriminating order form from the government through the transferee, all done under compulsion of law.[34] Petitioner's conviction as a transferor of marihuana is clearly protected by the Fifth Amendment privilege against self-incrimination.

3. *The Privilege Protects a Transferor of Marihuana Even if It Does Not Protect a Transferor of Narcotic Drugs*

The Court of Appeals affirmed this case below relying exclusively on the holding in *United States* v. *Minor*, 398 F.2d 511 (2d Cir. 1968), which held that conviction of a transferor of narcotic drugs not pursuant to an official written order form in violation of 26 U.S.C. 4705(a), did not violate the privilege against self-incrimination as developed in *Marchetti, Grosso* and *Haynes. Minor* turns expressly on the structure of the statutory scheme of the narcotic drug laws. The court in *Minor* found that the narcotic drug statutes are readily separable into incriminating and non-incriminating elements. The court in *Buie* rejected petitioner's argument that the marihuana statutes

[34] It does not eliminate the compulsion to say that petitioner has the "choice" of not engaging in the proscribed conduct. The Court has expressly rejected this reasoning. Moreover, the privilege is available for both past and future acts, providing the dangers are real and not "trifling or imaginary". *Marchetti* v. *United States*, 390 U.S. 39, 51-55.

were not separable in that way, and held that the *Minor* reasoning applied to the marihuana case.[35]

The transfer provision of the narcotic drug laws is 26 U.S.C. 4705. This section makes it unlawful to transfer narcotic drugs to one who has not obtained a Treasury Department form for that purpose; 26 U.S.C. 4742 imposes the same requirement for transfer of marihuana. The vital difference lies in the process of obtaining the form and the process by which incriminating information is made available to the Treasury Department. Section 4705(f) directs the Secretary of the Treasury to prepare forms, which will be supplied only to persons who have registered and paid the tax under 26 U.S.C. 4721 and 4722. At the time of obtaining the form, the name of the purchaser only is placed on the form and recorded by the Treasury Department. A seller is then forbidden by 26 U.S.C. 4705 to sell except to a purchaser who presents such a form with the purchaser's name inscribed. Following the sale, the seller is then required, by 26 C.F.R. §151.201, to forward a copy of the form to the Treasury Department. The sale of narcotic drugs is thus broken up into several discrete steps: (1) presentation of the buyer's name to the government by the buyer in order to procure a slip; (2) sale by the seller on presentation of a slip; (3) presentation of the seller's name to the government by the seller after the sale. This division was essential to the Court's reasoning in *Minor*. In considering the limited requirements of 26 U.S.C. 4705, the Court of Appeals reasoned:

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[35] In addition the *Buie* court applied the other important aspect of the *Minor* decision to the marihuana area and held that the marihuana statutes were not aimed at a class "inherently suspect of criminal activity." This issue has been dealt with in Point B above.

> " . . . And, a seller's failure to fill out or retain the order form in no way affects the statutory purpose of limiting sales to purchasers who are duly authorized to deal in narcotic drugs. Thus, we conclude as the Court did in *Nigro* that: 'To punish him [the seller] for this misuse [or, in the instant case, lack of use] of an order form is not to punish him for not recording his own crime.' 276 U.S. at 350-351, 48 S. Ct. at 394." *United States* v. *Minor*, 398 F.2d 511, 515.

Thus, in the narcotic drugs statutes the requirement of sale only on presentation of an order form, and the self-incriminatory act of submitting one's name to the government, are completely separate. The Court reasoned that since one may obey the former requirement without obeying the latter it is proper to convict for violating the former requirement. However, the marihuana statute, 26 U.S.C. 4742(c), expressly requires that the name of the seller be recorded on the form and in the records of the government before the form is issued. Therefore, in order for a seller to satisfy the §4742 requirement of sale of marihuana only to the possesser of a form, the seller must insure that his, i.e. the seller's, name is recorded with the government prior to the sale. Here, the self-incrimination is an inseparable part of the crime charged, and the seller cannot satisfy the requirement of §4742 without incriminating himself. The *Marchetti* and *Leary* reasoning rather than the *Minor* reasoning therefore applies.

Conclusion

For the foregoing reasons the judgment below should be reversed in all respects.

Respectfully submitted,

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